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UNITED STATES DISTRICT COURT

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DISTRICT OF NEVADA

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11 RONALD D. DIGGS,) Case No.: 2:09-cv-02339-RLH-CWH
12)
13 Plaintiff,) O R D E R
14) (Motion for Summary Judgment- #88;
15 vs.) Motion for Summary Judgment- #89)
16 LAS VEGAS METROPOLITAN POLICE)
17 DEPARTMENT, a political subdivision of the)
18 State of Nevada; SGT. D. WALBURN,)
19 individually; OFFICER T. ROBERTS,)
20 individually; and JOHN DOES I-X, inclusive,)
21)
22 Defendant(s).)
23)
24)
25)
26)

19 Before the Court is Defendant Las Vegas Metropolitan Police Department's
20 ("LVMPD") **Motion for Summary Judgment** (#88, filed Feb. 5, 2015). The Court has
21 considered Plaintiff Ronald D. Diggs' Opposition (#100, filed Mar. 27, 2015), and Defendant's
22 Reply (#103, filed May 27, 2015).

23 Also before the Court is Defendants Terry Roberts ("Officer Roberts") and Damian
24 Walburn's ("Officer Walburn") **Motion for Summary Judgment** (#89, filed Feb. 5, 2015). The
25 Court has considered Plaintiff's Opposition (#98, filed Mar. 26, 2015), and Defendants' Reply
26 (#104, filed May 27, 2015).

BACKGROUND

Plaintiff Ronald Diggs (“Diggs”) alleges that Defendants violated his constitutional rights by unlawfully arresting him and using excessive force to do so. The incident arises from an encounter between Diggs and police officers from the LVMPD’s Problem Solving Unit who were conducting an undercover patrol in the area of Fremont Street and North 21st Street in Las Vegas, Nevada.

Diggs alleges the following facts to support his claim. At approximately midnight on April 20, 2009, Diggs was walking southbound on North 21st Street when he saw a white minivan drive by him traveling northbound. (#88-1, Mot. Ex. B, Ronald D. Diggs Dep. 74:1-21.) Diggs looked at the occupants of the minivan because they looked at him, but he did not make any gesture toward the minivan. (*Id.* at 75:18-22.) Diggs heard the minivan turn around and he looked over his shoulder because he thought it was parking, but he continued to walk away from the minivan. (*Id.* at 80:3-16.) He did not hear the minivan's doors open, nor did he hear anyone say anything to him. (*Id.* at 87:5-11.) The next thing Diggs knew, he was struck in the back by surprise and without warning. (*Id.* at 80:12-81:6.) The force caused Diggs to fly through the air and then fall onto the sidewalk, landing on his left knee and forearm. (*Id.* at 82:1-25.) Diggs did not realize it was a police officer who struck him until he was handcuffed. (*Id.* at 75:23-76:14.) After complaining of injury, Diggs was transported to the hospital, where he was diagnosed with a sprain/strain of the left shoulder and left knee, and then transported to jail. (#88-6, Mot. Ex. N, 55-56.) Diggs asserts that Officer Roberts tackled him and alleges that he sustained left knee instability, cervical spine problems, severe pain, and neck and nerve problems as a result of the incident. (#88-1, Mot. Ex. A, Pl.'s Interrog. Resp. 6:13-17.)

The officers, on the other hand, allege that they saw Diggs standing near an alleyway marked with a “no trespassing” sign. (#88-3, Mot. Ex. E, Officer Roberts Dep., 69:8-17.) As they drove by Diggs, he stepped into the street and “flagged” at them, which they understood to be an offer to sell drugs. (*Id.* at 74:10-22.) The officers turned around to contact

1 Diggs and he began to walk towards their minivan. (#88-2, Mot. Ex. D, Officer Walburn Dep.,
 2 55:20-25.) Diggs arrived at the front passenger area of the minivan at approximately the same
 3 time it came to a stop and Officer Walburn opened the passenger side door. (*Id.*) Diggs then
 4 abruptly turned around and began to walk away. (*Id.* 58:24-60:20.) Although the officers were
 5 dressed in plain clothes, they believed that Diggs recognized them as police officers because
 6 Officer Walburn was wearing a yellow LVMPD jacket. (*Id.*) The officers assert that one of
 7 Diggs' hands was concealed in a pocket, while his other hand was positioned at his mouth as if he
 8 was eating something, which they believed to be drugs. (*Id.*) The officers admit that they never
 9 verbally identified themselves as police, nor activated the undercover minivan's lights or siren.
 10 (#88-3, Mot. Ex. E, 83:1-25.) However, Officer Walburn testified that he commanded Diggs to
 11 stop and remove his hand from his pocket, but Diggs did not comply. (#88-2, Mot. Ex. D,
 12 56:17-23.)

13 Officer Roberts exited the driver's side of the minivan and heard Officer Walburn
 14 command Diggs to stop. Two or three seconds later, Officer Roberts approached Diggs from
 15 behind, while Diggs was still walking away, and executed a tackle takedown maneuver in which
 16 he grabbed Diggs around the chest and upper body and took him to the ground. (#88-3, Mot. Ex.
 17 E, 101:8-102:13; 106:3-16; 109:7-19.) Officer Walburn then assisted Officer Roberts with
 18 handcuffing Diggs, who was kicking his feet and concealing his hand underneath his body.
 19 (#88-2, Mot. Ex. D, 66:23-68:11.) By all accounts, no more than forty seconds elapsed from the
 20 time the officers turned around and Officer Roberts tackled Diggs.

21 As a result of the incident, Diggs was charged by the LVMPD with (1) failing to
 22 change his address as an ex-felon, (2) walking in the roadway, (3) trespassing, and (4) littering.
 23 (#88-6, Mot. Ex. O.) On May 14, 2009, Diggs appeared at the Las Vegas Municipal Court and
 24 entered nolo contendere pleas to the walking in the roadway and trespassing charges.¹ (#88-6,
 25 Mot. Ex. P). The court adjudicated Diggs guilty and sentenced him to credit for time served. (*Id.*)

26 ¹ The other charges were not pursued.

1 The LVMPD also completed an internal investigation and found that Officers Roberts and
 2 Walburn did not violate the LVMPD's use of force policy. (#88-8, Mot. Ex. Z.)

3 Diggs commenced this lawsuit on December 12, 2009. Diggs filed his First
 4 Amended Complaint on August 21, 2013, alleging five claims: (1) deprivation of constitutional
 5 rights pursuant to 42 U.S.C. § 1983; (2) *Monell* violation of constitutional rights pursuant to 42
 6 U.S.C. § 1983; (3) intentional infliction of emotional distress; (4) negligent infliction of emotional
 7 distress; and (5) assault and battery and negligence. Defendants have now filed motions for
 8 summary judgment. For the reasons discussed below, the Court grants the LVMPD's motion.
 9 With respect to Officer Roberts and Walburn's motion, the Court grants the motion as to Officer
 10 Walburn, and the Court grants the motion in part and denies the motion in part as to Officer
 11 Roberts.

12 **DISCUSSION**

13 **I. Summary Judgment Standard**

14 The purpose of summary judgment is to avoid unnecessary trials when there is no
 15 dispute as to the facts before the court. *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d
 16 1468, 1471 (9th Cir.1994). Summary judgment is appropriate when "the movant shows that there
 17 is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of
 18 law." Fed. R.Civ. P. 56(a). An issue is "genuine" if there is a sufficient evidentiary basis on
 19 which a reasonable fact-finder could find for the nonmoving party, and a dispute is "material" if it
 20 could affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477
 21 U.S. 242, 248-49 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587
 22 (1986). Where reasonable minds could differ on the material facts at issue, however, summary
 23 judgment is not appropriate. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995). "The
 24 amount of evidence necessary to raise a genuine issue of material fact is enough 'to require a jury
 25 or judge to resolve the parties' differing versions of the truth at trial.' *Aydin Corp. v. Loral Corp.*,
 26 718 F.2d 897, 902 (9th Cir. 1983) (quoting *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253,

1 288–89 (1968)). In evaluating a summary judgment motion, a court views all facts and draws all
 2 inferences in the light most favorable to the nonmoving party. *Kaiser Cement Corp. v. Fischbach*
 3 & *Moore, Inc.*, 793 F.2d 1100, 1103 (9th Cir. 1986).

4 The moving party bears the burden of showing that there are no genuine issues of
 5 material fact. *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982). “In order to carry
 6 its burden of production, the moving party must either produce evidence negating an essential
 7 element of the nonmoving party’s claim or defense or show that the nonmoving party does not
 8 have enough evidence of an essential element to carry its ultimate burden of persuasion at trial.”
 9 *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000). Once the
 10 moving party satisfies Rule 56’s requirements, the burden shifts to the party resisting the motion to
 11 “set forth specific facts showing that there is a genuine issue for trial.” *Anderson*, 477 U.S. at 256.
 12 The nonmoving party “may not rely on denials in the pleadings but must produce specific
 13 evidence, through affidavits or admissible discovery material, to show that the dispute exists,”
 14 *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991), and “must do more than simply
 15 show that there is some metaphysical doubt as to the material facts.” *Matsushita*, 475 U.S. at 586.
 16 “The mere existence of a scintilla of evidence in support of the plaintiff’s position will be
 17 insufficient.” *Anderson*, 477 U.S. at 252.

18 **II. 42 U.S.C. § 1983 Individual Capacity Claims (First Claim)**

19 Diggs asserts that Officers Roberts and Walburn violated his constitutional rights
 20 pursuant to 42 U.S.C. § 1983. “To state a claim under § 1983, a plaintiff must allege the violation
 21 of a right secured by the Constitution and laws of the United States, and must show that the
 22 alleged deprivation was committed by a person acting under color of state law.” *West v. Atkins*,
 23 487 U.S. 42, 48 (1988). Here, the parties do not dispute that the Officers were acting under the
 24 color of state law but, instead, dispute whether they violated Diggs’ Fourth Amendment rights.

25 The Fourth Amendment guarantees “[t]he right of the people to be secure in their
 26 persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. Const.

1 amend. IV. Diggs alleges two distinct Fourth Amendment violations in his first claim for relief:
 2 unlawful arrest and excessive force.

3 **A. Unlawful Arrest**

4 Officers Roberts and Walburn argue that Diggs is barred by *Heck v. Humphrey*, 512
 5 U.S. 477 (1994), from challenging his arrest because he was adjudicated guilty in Las Vegas
 6 Municipal Court for walking in the roadway and trespassing. “*Heck* precludes a section 1983
 7 claim based on actions which would ‘render a conviction or sentence invalid’ where that
 8 conviction has not been reversed, expunged, or called into question by issuance of a writ of habeas
 9 corpus.” *Smithart v. Towery*, 79 F.3d 951, 952 (9th Cir. 1996) (per curium) (quoting *Heck*, 512
 10 U.S. at 487). The critical element a district court must consider is “whether plaintiff’s action, if
 11 successful, will demonstrate the invalidity of any outstanding criminal judgment.” *Beets v. Cnty. of*
 12 *L.A.*, 669 F.3d 1038, 1043 (9th Cir. 2012) (quoting *Heck*, 512 U.S. at 486–87). “[I]f it would, the
 13 complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence
 14 has already been invalidated.” *Ove v. Gwinn*, 264 F.3d 817, 822 (9th Cir. 2001) (quoting *Heck*,
 15 512 U.S. at 487). However, if a plaintiff’s action, if successful, will not demonstrate the invalidity
 16 of the criminal judgment, the action should proceed. *Id.*

17 Diggs argues that his nolo contendere pleas to the charges are insufficient to show
 18 that he committed the underlying crimes. However, the Ninth Circuit has regularly treated nolo
 19 contendere pleas as convictions under the *Heck* doctrine. *See Szajer v. City of Los Angeles*, 632
 20 F.3d 607, 609–12 (9th Cir. 2011); *Radwan v. Cnty. of Orange*, 519 Fed.Appx. 490, 490–91 (9th
 21 Cir. 2013). Likewise, district courts in this Circuit have concluded that nolo contendere pleas are
 22 convictions for *Heck* purposes. *See, e.g., Haack v. City of Carson City*, No. 3:11-cv-00353, 2012
 23 WL 3962453 (D. Nev. Sept. 10, 2012); *Kyles v. Baker*, Case No. 13-cv-04695, 2014 WL 5524256
 24 (N.D. Cal. Oct. 31, 2014). Moreover, the Nevada Supreme Court has held that a nolo contendere
 25 plea is equivalent to a guilty plea because it authorizes the court to treat the defendant as if he
 26 pleaded guilty. *State v. Lewis*, 178 P.3d 146, 147 n. 1 (Nev. 2008) (per curium). “The purpose of

1 the *Heck* doctrine is to ensure that valid state criminal convictions and sentences are not, in effect,
 2 retroactively contradicted by subsequent federal civil actions” and that purpose applies to any
 3 conviction whether by guilty or nolo contendere plea. *Kyles*, 2014 WL 5524256, at *8 (internal
 4 quotation marks omitted). Thus, Diggs’ nolo contendere pleas qualify as convictions under *Heck*.

5 Diggs’ unlawful arrest claim is *Heck* barred. In order for Diggs to prevail on the
 6 claim, he would have to demonstrate that the police officers did not have probable cause to arrest
 7 him. Such a result would invalidate Diggs’ underlying criminal convictions, which *Heck* squarely
 8 prohibits. *See Smithart*, 79 F.3d at 952 (finding *Heck* bars claims that officers lacked probable
 9 cause to arrest and brought unfounded charges). Furthermore, there is no evidence that Diggs’
 10 convictions have been overturned or invalidated. Accordingly, the Court grants Officers Roberts
 11 and Walburn’s motion on the unlawful arrest claim.

12 **B. Excessive Force**

13 Diggs alleges that Officers Roberts and Walburn violated his Fourth Amendment
 14 right to be free from excessive force. Specifically, Diggs asserts that the tackle by Officer Roberts
 15 constituted the excessive force. (*See* Dkt. #59, Am. Compl.) Diggs does not allege that any
 16 conduct after the tackle, including the handcuffing, constituted excessive force. With that in mind,
 17 the Court will conduct an individualized analysis of each Officers’ actions relating to the alleged
 18 excessive force. *Cunningham v. Gates*, 229 F.3d 1271, 1289 (9th Cir. 2000).

19 **1. Officer Walburn**

20 Officer Walburn moves for summary judgment because he argues there is no
 21 evidence he used excessive force in Diggs’ arrest. The Court agrees. As Officer Walburn did not
 22 tackle Diggs, he did not participate in the alleged constitutional deprivation and, therefore, did not
 23 use excessive force against Diggs. *See Jones v. Williams*, 297 F.3d 930, 934 (9th Cir. 2002).

24 Nevertheless, Diggs argues that Officer Walburn is still liable for the alleged
 25 excessive force because he failed to intercede and prevent the tackle. To be sure, a police officer
 26 has “a duty to intercede when [his] fellow officers violate the constitutional rights of a suspect or

1 other citizen" and will be liable for the deprivation along with his fellow officers if he fails to
 2 intercede. *Cunningham*, 229 F.3d at 1289–90 (citing *United States v. Koon*, 34 F.3d 1416, 1447 n.
 3 25 (9th Cir. 1994)). However, an officer is liable for failing to intercede only if he had a "realistic
 4 opportunity" to do so. *Id.*

5 Here, the undisputed evidence shows that Officer Walburn did not have a realistic
 6 opportunity to intercede and prevent Officer Roberts from tackling Diggs. The Officers did not
 7 formulate any plan to tackle Diggs. (See Dkt. #88–2, Mot. Ex. D, Officer Walburn Dep. 54:1–20.)
 8 Officer Walburn did not command Officer Roberts to tackle Diggs, nor did Officer Roberts tell
 9 him that he was going to make the tackle. (*Id.* at 63:15–24.) Finally, even if Officer Walburn
 10 knew that Officer Roberts was about to act, he did not have sufficient time to react in the few
 11 seconds that elapsed before the tackle. It is also notable that immediately after the tackle, Officer
 12 Walburn *did* intervene to assist with safely handcuffing Diggs. Accordingly, the Court grants
 13 Officer Walburn's motion on the excessive force claim.

14 **2. Officer Roberts**

15 Officer Roberts moves for summary judgment on Diggs' excessive force claim
 16 because he argues that his actions were objectively reasonable under the circumstances. All claims
 17 that law enforcement officers used excessive force in the course of an arrest, investigatory stop, or
 18 other seizure of a citizen are to be analyzed under the Fourth Amendment and its standard of
 19 objective reasonableness. *Graham v. Conner*, 490 U.S. 386, 395 (1989). The pertinent question is
 20 whether the use of force was "objectively reasonable in light of the facts and circumstances
 21 confronting [the officers], without regard to their underlying intent or motivation." *Id.* at 397
 22 (citation and internal quotation marks omitted).

23 The analysis of whether a specific use of force was reasonable "requires a careful
 24 balancing of the nature and quality of the intrusion on the individual's Fourth Amendment
 25 interests against the countervailing governmental interests at stake." *Id.* at 396 (quoting *Tennessee
 26 v. Garner*, 471 U.S. 1, 8 (1985)). First, the Court evaluates the severity of the intrusion on the

1 individual's Fourth Amendment rights by assessing the "type and amount of force inflicted."
 2 *Glenn v. Washington Cnty.*, 673 F.3d 864, 871 (9th Cir. 2011) (citation and internal quotation
 3 marks omitted). Second, the Court must assess the importance of the governmental interests at
 4 stake by evaluating three primary factors articulated in *Graham*: (1) whether the suspect posed an
 5 immediate threat to the safety of the officers or others; (2) the severity of the crime at issue; and
 6 (3) whether the suspect actively resisted arrest or attempted to evade arrest by flight. *Id.* at 872
 7 (citing *Graham*, 490 U.S. at 396). The most important factor is whether the suspect poses an
 8 immediate threat to the safety of the officers or others. *Id.* (citation and internal quotation marks
 9 omitted).

10 Finally, the court balances the gravity of the intrusion on the individual against the
 11 government's need for the intrusion. *Id.* at 871 (quoting *Miller v. Clark Cnty.*, 340 F.3d 959, 964
 12 (9th Cir. 2003)). The reasonableness inquiry evaluates all the relevant objective facts and
 13 circumstances that confronted the officers in each particular case, "judged from the perspective of
 14 a reasonable officer on the scene, 'rather than with the 20/20 vision of hindsight.'" *Id.* (quoting
 15 *Graham*, 490 U.S. at 396). "The calculus of reasonableness must embody allowance for the fact
 16 that police officers are often forced to make split-second judgments—in circumstances that are
 17 tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular
 18 situation." *Id.* (quoting *Graham*, 490 U.S. at 396-97).

19 Because the reasonableness balancing test "nearly always requires a jury to sift
 20 through disputed factual contentions, and to draw inferences therefrom," courts should grant
 21 summary judgment in excessive force cases "sparingly." *Drummond ex rel. Drummond v. City of*
Anaheim, 343 F.3d 1052, 1056 (9th Cir. 2003) (citation omitted). "This is because police
 22 misconduct cases almost always turn on a jury's credibility determinations." *Id.* However, a court
 23 may decide reasonableness as a matter of law if, "in resolving all factual disputes in favor of the
 24 plaintiff, the officer's force was objectively reasonable under the circumstances." *Jackson v. City*
of Bremerton, 268 F.3d 646, 651 n.1 (9th Cir. 2001) (citation omitted).

1 Here, viewing the facts in the light most favorable to Diggs, genuine issues of
 2 material fact remain regarding whether Officer Roberts used excessive force. Officer Roberts
 3 executed a tackle takedown maneuver on Diggs, causing Diggs to fall to the ground. To the extent
 4 that Officer Roberts suggests the use of force was not excessive because Diggs' injuries were *de*
 5 *minimis*, the Court finds the argument to be unpersuasive. While "neither tackling nor punching a
 6 suspect to make an arrest necessarily constitutes excessive force [,] [...] even when some force is
 7 justified the amount actually used may be excessive." *Blankenhorn v. City of Orange*, 485 F.3d
 8 463, 477 (9th Cir. 2007) (citations and internal quotation marks omitted); *Santos v. Gates*, 287
 9 F.3d 846, 854 (9th Cir. 2002) (noting that even the overly tight application of handcuffs can
 10 constitute excessive force depending on the circumstances).

11 As to the governmental interests at stake, Officer Roberts saw Diggs commit the
 12 misdemeanor crimes of trespassing and walking in the roadway, neither of which are violent
 13 crimes. Even assuming it was reasonable for Officer Roberts to believe that Diggs could be
 14 armed, the Court cannot say that Diggs posed a threat to the safety of the officers or that he was
 15 resisting arrest such that Officer Roberts is entitled to summary judgment. A reasonable jury could
 16 conclude that Diggs posed no immediate threat to the officers' safety because he never threatened
 17 them with a weapon and he walked away from their location. Even if a trier of fact determines that
 18 Diggs' hand was concealed, questions of fact remain whether he posed an immediate threat under
 19 the circumstances especially considering, according to Diggs, he was never told to remove his
 20 hand from his pocket and he was tackled so quickly by surprise. *See Jaramillo v. City of San*
 21 *Mateo*, Case No. 13-cv-00441, 2014 WL 7240265, at *7-8 (N.D. Cal. Dec. 19, 2014) (noting that
 22 whether a suspect poses an immediate threat when he refuses to remove his hands from his pockets
 23 is reasonably disputable depending upon the other *Graham* factors).

24 In addition to disputing the level of danger Diggs posed, the parties dispute whether
 25 Diggs was actively resisting arrest. A reasonable jury could deduce that Diggs did not have any
 26 reason to know it was the police behind him, or that he was under arrest, considering that it was

1 dark outside, the police were in an unmarked van, they did not activate their emergency lights, and
 2 they did not verbally identify themselves. Still, even if the trier of fact determines that Diggs
 3 recognized them as police officers and Officer Walburn did command Diggs to stop, a reasonable
 4 jury could find that responding with a physical tackle was excessive because Diggs was not
 5 physically assaultive towards the Officers. *See Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1091
 6 (9th Cir. 2013) (“While purely passive resistance can support some force, the level of force an
 7 individual’s resistance will support is dependent upon the factual circumstances underlying that
 8 resistance.”). Balancing the amount of force used against the governmental interests, a reasonable
 9 jury could conclude that Officer Roberts used excessive force under the circumstances.

10 Accordingly, the Court denies Officer Roberts’ motion on the excessive force claim.

11 **3. Qualified Immunity**

12 Officer Roberts argues that if summary judgment on reasonableness grounds is
 13 precluded, he is still entitled to summary judgment based on qualified immunity. Qualified
 14 immunity shields government officers from suit “as long as their actions could reasonably have
 15 been thought consistent with the rights they are alleged to have violated.” *Anderson v. Creighton*,
 16 483 U.S. 635, 638 (1987) (citations omitted). Even where Fourth Amendment rights are violated,
 17 government officers may still be immune from suit where the right violated was not clearly
 18 established at the time of the violation. *Liberal v. Estrada*, 632 F.3d 1064, 1076 (9th Cir. 2011).
 19 Thus, having determined that Officer Roberts is not entitled to summary judgment based on the
 20 reasonableness of his actions, the Court may still grant summary judgment if Diggs’ right was not
 21 clearly established. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

22 A right is clearly established if “it would be clear to a reasonable officer that his
 23 conduct was unlawful in the situation he confronted.” *Wilkins v. City of Oakland*, 350 F.3d 949,
 24 954 (9th Cir. 2003) (emphasis omitted) (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001)). The
 25 court should make this second inquiry “in light of the specific context of the case, not as a broad
 26 general proposition.” *Saucier*, 533 U.S. at 201. An officer will be entitled to qualified immunity

even if he was mistaken in his belief that his conduct was lawful, so long as that belief was reasonable. *Wilkins*, 350 F.3d at 955. The plaintiff bears the burden of showing that the right at issue was clearly established. *Sorrels v. McKee*, 290 F.3d 965, 969 (9th Cir. 2002) (citation omitted). But a plaintiff need not establish a court previously declared the defendant's behavior unconstitutional if it would be clear from prior precedent that the conduct was unlawful. *Blueford v. Prunty*, 108 F.3d 251, 254 (9th Cir. 1997).

Viewing the facts in the light most favorable to Diggs, Officer Roberts is not entitled to summary judgment. Recognizing that the moments preceding Officer Roberts' tackle of Diggs may have been tense, the Court is, nevertheless, unable to conclude as a matter of law that a reasonable officer would have determined that physically tackling a suspect who committed misdemeanor violations, and who was not threatening the officers or resisting arrest, comported with the *Graham* factors and the case law interpreting them. Accordingly, the Court denies Officer Roberts' motion.

II. 42 U.S.C. § 1983 *Monell* Claim (Second Claim)

Diggs asserts that the LVMPD violated 42 U.S.C. § 1983 by failing to properly hire, train, supervise, and/or discipline Officers Roberts and Walburn. The LVMPD seeks summary judgment on each of these allegations. Because Diggs failed to oppose the LVMPD's motion with respect to inadequate hiring and training, he is deemed to have consented to granting the motion on these claims. *See* LR 7-2. Therefore, two theories of municipal liability remain: (1) failure to supervise; and (2) ratification of unconstitutional conduct through failure to discipline.

A municipal entity may be liable under § 1983 "only where the municipality itself causes the constitutional violation through execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy." *Ulrich v. City & Cnty. of S.F.*, 308 F.3d 968, 984 (9th Cir. 2002) (quoting *Monell v. Dep't of Soc. Serv.*, 436 U.S. 658, 694 (1978)). To establish municipal liability, a plaintiff must demonstrate (1) that a municipal employee violated the plaintiff's rights, (2) that the municipality

1 had customs or policies that amount to deliberate indifference of the plaintiff's constitutional
 2 rights, and (3) that these customs policies were the moving force behind the employee's violation
 3 of the plaintiff's constitutional right. *Gibson v. Cnty. of Washoe, Nev.*, 290 F.3d 1175, 1193–94
 4 (9th Cir. 2002) (citation omitted). Deliberate indifference requires that the municipality was on
 5 “actual or constructive notice that its omission would likely result in a constitutional violation.”
 6 *Id.* at 1186 (citation omitted). A plaintiff may prove a municipal policy was the moving force
 7 behind a constitutional violation in three ways: (1) the municipality adopted an express policy; (2)
 8 a municipal employee commits a constitutional violation pursuant to the municipality's
 9 longstanding practice or custom; or (3) the person causing the violation has final policymaking
 10 authority. *Webb v. Sloan*, 330 F.3d 1158, 1164 (9th Cir. 2003). Diggs bases his claims on an
 11 informal custom or policy and ratification by a policymaker.

12 As to the existence of an informal custom or policy, municipal liability on such a
 13 theory must be founded on “a longstanding practices or custom which constitutes the standard
 14 operating procedure of the local government entity.” *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir.
 15 1996) (quoting *Gillette v. Delmore*, 979 F.2d 1342, 1346 (9th Cir. 1992)). Accordingly, “[a]
 16 plaintiff cannot prove the existence of a municipal policy or custom based solely on the occurrence
 17 of a single incident or unconstitutional action by a non–policymaking employee.” *Davis v. City of*
 18 *Ellensburg*, 869 F.2d 1230, 1233 (9th Cir. 1989) (citation omitted). However, the Ninth Circuit
 19 has long recognized that “a custom or practice can be inferred from widespread practices or
 20 evidence of repeated constitutional violations for which the errant municipal officers were not
 21 discharged or reprimanded.” *Hunter v. Cnty. of Sacramento*, 652 F.3d 1225, 1233 (9th Cir. 2011)
 22 (citations and internal quotation marks omitted).

23 Diggs has failed to present sufficient evidence to raise a genuine issue of fact that
 24 the LVMPD failed to supervise its police officers such that a policy or custom of excessive force
 25 developed. Failure to supervise can serve as the basis for liability under § 1983 if it amounts to
 26 “deliberate indifference to the rights of person with whom the police come into contact.” *Davis*,

1 869 F.2d at 1235 (citation and internal quotation marks omitted). However, to the extent that
 2 Diggs supports his claim by citing to Officer Walburn's alleged supervisory omissions during the
 3 incident, this fails because a review of a supervisor's conduct from a single incident is insufficient
 4 to show a policy or custom of widespread inadequate supervision.

5 Moreover, Diggs has not provided sufficient evidence to create an inference that the
 6 LVMPD has established a widespread policy of inadequate supervision through repeatedly failing
 7 to discipline its officers for using excessive force. While Diggs points out that the LVMPD
 8 previously suspended Officer Roberts for one day as a reprimand for striking a handcuffed suspect,
 9 he speculates that this suspension was inadequate. However, Diggs fails to provide any specific
 10 evidence showing that the reprimand was, in fact, inadequate or that the LVMPD otherwise has an
 11 informal policy of doling out inadequate reprimands. Therefore, there is insufficient evidence to
 12 demonstrate that the LVMPD has an informal policy or custom of failing to supervise or discipline
 13 its officers.

14 As to action by a final policymaker, a municipality may be held liable for a single
 15 constitutional violation under a ratification theory if an authorized policymaker "approve[s] a
 16 subordinate's decision and the basis for it." *Sheehan v. City & Cnty. of S.F.*, 743 F.3d 1211, 1231
 17 (9th Cir. 2014) (citing *Christie v. Iopa*, 176 F.3d 1231, 1239 (9th Cir. 1999)), *overruled on other*
 18 *grounds by City & Cnty. of S.F. v. Sheehan*, 135 S.Ct. 1765 (2015). Ratification generally requires
 19 more than the final policymaker's "acquiescence" of an employee's conduct. *Id.* Instead, the
 20 policymaker must make a "deliberate choice to endorse" the officer's actions." *Id.* (quoting
 21 *Gillette*, 979 F.2d at 1348). Here, Diggs contends that the LVMPD ratified the conduct because
 22 the Officers were not disciplined for their alleged constitutional violations. However, Diggs has
 23 not identified who he contends is a final policymaker. Looking beyond that deficiency, Diggs also
 24 fails to present sufficient evidence to raise a genuine issue of fact that a final policymaker made a
 25 deliberate choice to endorse the Officer's actions.

26

The Ninth Circuit has held that the mere failure to discipline officers who have been accused of unconstitutional conduct, without more, does not amount to ratification of the allegedly unconstitutional actions. *See id.* (holding the mere failure to discipline does not amount to ratification); *Haugen v. Brosseau*, 351 F.3d 372, 393 (9th Cir. 2003) (same), *overruled on other grounds by Brosseau v. Haugen*, 543 U.S. 194 (2004). To the extent that Diggs argues the LVMPD’s internal affairs investigation constitutes “more” than a failure to discipline, the Court disagrees. The investigators conducted interviews and, albeit relying on the officers’ recitation of the events, provided a report detailing their findings and rationale as to why neither Officer Roberts nor Officer Walburn violated the LVMPD’s use of force policy. *See Kanae v. Hodson*, 294 F. Supp. 2d 1179, 1191 (D. Haw. 2003) (“The law does not say that, whenever an investigative group accepts an officer’s version over a victim’s differing version, this acceptance establishes a policy for which a municipality may be held liable under § 1983.”). Thus, there is insufficient evidence to demonstrate that a final policymaker ratified the allegedly unconstitutional conduct. Accordingly, the Court grants the LVMPD’s motion.

III. State Law Claims

Diggs brings state law claims against Officers Roberts and Walburn for intentional and negligent infliction of emotional distress. Diggs also brings pendent claims of assault, battery, and negligence against both Officers and the LVMPD.

As an initial matter, the Court notes that the “use of force” forms the basis of all of Diggs’ state law claims. As explained previously, Officer Walburn did not use excessive force against Diggs. Accordingly, the Court grants Officer Walburn’s motion on all state law claims.

A. Immunity

In their respective motions Defendants argue they cannot be liable under Nevada law for Diggs’ state law claims because they are entitled to immunity based on a discretionary action. Pursuant to NRS § 41.032, no action may be brought against a state officer or employee or any state agency or political subdivision that is “[b]ased upon the exercise or performance or the

1 failure to exercise or perform a discretionary function or duty on the part of the State or any of its
 2 agencies or political subdivisions or of any officer, employee or immune contractor of any of
 3 these, whether or not the discretion involved is abused.” Nev. Rev. Stat. § 41.032(2).

4 The Nevada Supreme Court has adopted the federal test for immunity based on a
 5 discretionary action. Under this test, immunity applies when the act (1) involves elements of
 6 individual judgment or choice and (2) is based on considerations of social, economic, or political
 7 policy. *Martinez v. Maruszczak*, 168 P.3d 720, 729 (Nev. 2007). In analyzing the immunity,
 8 courts “must assess cases on their facts, keeping in mind Congress’ purpose in enacting the
 9 exception: to prevent judicial second-guessing of legislative and administrative decisions grounded
 10 in social, economic, and political policy through the medium of an action in tort.” *Id.* (citations
 11 and internal quotation marks omitted). Nevada looks to federal decisional law for guidance on
 12 what type of conduct the immunity should protect. *Id.* at 727-28.

13 With respect to the state law claims Diggs alleges against the LVMPD, the Ninth
 14 Circuit has held that “decisions relating to the hiring, training, and supervision of employees
 15 usually involve policy judgments of the type Congress intended the discretionary-function
 16 exception to shield.” *Vickers v. United States*, 228 F.3d 944, 950 (9th Cir. 2000). This court,
 17 relying on guidance from the Ninth Circuit, has specifically held that NRS §41.032 bars claims for
 18 negligent hiring, training, and supervision. *Neal-Lomax v. Las Vegas Metro. Police Dep’t*, 574 F.
 19 Supp. 2d 1170, 1192 (D. Nev. 2008). Diggs fails to advance any argument regarding his theory of
 20 liability as to the state law claims against the LVMPD. To the extent that Diggs bases these claims
 21 on inadequate hiring, training, or supervision of its officers, the LVMPD is entitled to immunity
 22 here pursuant to NRS § 41.032. See *Vasquez-Brenes v. Las Vegas Metro. Police Dep’t*, 51 F.
 23 Supp. 3d 999, 1013 (D. Nev. 2014) (holding state immunity barred battery and negligence claims
 24 against the LVMPD based on theories of negligent hiring, training, or supervision). Accordingly,
 25 the Court grants the LVMPD’s motion on the state law claims of assault, battery, and negligence.
 26

Officer Roberts is not entitled to immunity pursuant to NRS § 41.032 because both prongs of *Martinez*'s test are not satisfied. Under the first prong of the test, an officer's decision regarding the amount of force to use under the circumstances is necessarily discretionary and requires an officer's individual judgment and choice. *Huff v. N. Las Vegas Police Dep't*, No. 2:10-cv-01394, 2013 WL 6839421, at *10 (D. Nev. Dec. 23, 2013). Officer Roberts had to make individual judgments regarding the necessity to use force against Diggs based on the circumstances confronting him in a rapidly evolving situation. Therefore, Officer Roberts' decision here was discretionary in nature.

However, Officer Roberts’ conduct does not meet the second prong of the test. Immunity attaches under the second prong “if the injury-producing conduct is an integral part of governmental policy-making or planning, if the imposition of liability might jeopardize the quality of the governmental process, or if the legislative or executive branch’s power or responsibility would be usurped.” *Martinez*, 168 P.3d at 729 (citation omitted). “[D]ecisions regarding the amount of force to use are not the kind of policy decisions the discretionary function exception was designed to shield.” *Huff*, 2013 WL 6839421, at *10; *Vasquez-Brenes*, 51 F. Supp. 3d at 1013. Imposing liability on officers who exceed the permissible use of force does not affect an integral part of governmental policy making, nor does it jeopardize the quality of the governmental process. *Huff*, 2013 WL 6839421, at *10; *Vasquez-Brenes*, 51 F. Supp. 3d at 1013. The amount of force a police officer uses to effectuate an arrest does not further any public policy goals, but rather involves the officer’s application of his training to the circumstances confronting him at the time. Finally, evaluating whether a police officer used excessive force does not usurp the legislative or executive branch’s power or responsibility because “[n]o branch of government has the legitimate power to violate the Fourth Amendment of the United States Constitution.” *Huff*, 2013 WL 6839421, at *10. Based on these considerations, Officer Roberts is therefore not entitled to immunity here based on a discretionary action. Accordingly, the Court denies Officer Roberts’ motion based on immunity.

1 **B. Causes of Action**2 **1. Intentional infliction of emotional distress**

3 Diggs asserts an intentional infliction of emotional distress (“IIED”) claim against
 4 Officer Roberts. To recover for IIED, a plaintiff must prove that (1) the defendant engaged in
 5 extreme and outrageous conduct with the intention of causing emotional distress or with reckless
 6 disregard for the plaintiff’s emotional distress, (2) the plaintiff suffered severe or extreme
 7 emotional distress as a result, and (3) the defendant’s actions were the proximate cause of
 8 plaintiff’s emotional distress. *Star v. Rabello*, 625 P.2d 90, 91–92 (Nev. 1981). In order for
 9 conduct to be extreme and outrageous it must be “outside all possible bounds of decency and []
 10 regarded as utterly intolerable in a civilized community.” *Maduike v. Agency Rent-A-Car*, 953
 11 P.2d 24, 26 (Nev. 1998) (internal quotation marks omitted).

12 Here, Officer Roberts argues that Diggs has produced insufficient evidence to
 13 support his claim. The Court agrees. Diggs has pointed to no part of the record to demonstrate
 14 that Officer Roberts acted with the intent to cause, or reckless disregard for causing, emotional
 15 distress. In a rapidly evolving situation, Officer Roberts tackled Diggs with the purpose of
 16 detaining him. After the initial tackle, Officer Roberts did not behave in any manner that was
 17 violative of Diggs’ constitutional rights, such as may be the case if, for example, Officer Roberts
 18 had intentionally injured Diggs after he had been restrained. Instead, Officer Roberts and Walburn
 19 properly handcuffed Diggs and called for medical assistance when they realized Diggs sustained
 20 injuries from the tackle. Accordingly, the Court grants Officer Roberts’ motion on the IIED claim.

21 **2. Negligent infliction of emotional distress**

22 Diggs asserts a negligent infliction of emotional distress (“NIED”) claim against
 23 Officer Roberts. To bring a NIED claim, a *bystander* must have been “located near the scene,”
 24 “emotionally injured by the contemporaneous sensory observance” of the acts, and “closely related
 25 to the victim.” *Grotts v. Zahner*, 989 P.2d 415, 416 (Nev. 1999) (emphasis added). As this Court
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1 has repeatedly held, direct victims may not bring NIED claims as they are not bystanders. *See,*
 2 *e.g., Kennedy v. Carriage Cemetery Servs., Inc.*, 727 F. Supp. 2d 925, 934–35 (D. Nev. 2010).

3 Diggs alleges that he suffered emotional distress as a result of Officer Roberts'
 4 negligent conduct. Diggs has confused negligence claims with parasitic emotional distress
 5 damages with claims for NIED. The two causes of action, negligence with emotional distress
 6 damages and NIED, are simply not the same. Many attorneys have misinterpreted the Nevada
 7 Supreme Court's decision in *Shoen v. Amerco, Inc.*, 896 P.2d 469, 477 (Nev. 1995), wherein the
 8 court held that direct victims of negligence could obtain emotional distress damages. This
 9 decision did not do away with the bystander requirement of NIED claims, it merely held that
 10 plaintiffs pleading negligence may obtain emotional distress damages as NIED claimants may. *Id.*;
 11 *see Carriage Cemetery*, 727 F. Supp. 2d at 934–35 (explaining Nevada Supreme Court's holding
 12 in *Shoen*). Thus, as Diggs was a direct victim of the alleged negligence, the claim fails as a matter
 13 of law. Accordingly, the Court grants Officer Roberts' motion on the NIED claim.

14 **3. Negligence**

15 Diggs asserts a negligence claim against Officer Roberts. In a negligence action,
 16 the plaintiff must demonstrate that: (1) the defendant had a duty to exercise due care with respect
 17 to the plaintiff; (2) defendant breached this duty; (3) the breach was the legal cause of the
 18 plaintiff's injury; and (4) the plaintiff was damaged. *Scialabba v. Brandise Const. Co., Inc.*, 921
 19 P.2d 928, 930 (Nev. 1996).

20 “Whether a defendant owes a plaintiff a duty of care is a question of law.” *Id.*
 21 Police officers owe a duty of care to the members of the general public. *Vasquez-Brenes*, 51 F.
 22 Supp. 3d at 1014. As explained previously, genuine issues of material fact remain whether Officer
 23 Roberts adequately assessed the necessity to use the amount of force he ultimately used against
 24 Diggs. Accordingly, the Court denies Officer Roberts' motion on the negligence claim.

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1 **4. Assault and Battery**

2 Diggs asserts assault and battery claims against Officer Roberts. To establish an
 3 assault claim, a plaintiff must show the actor (1) intended to cause harmful or offensive physical
 4 contact, and (2) the victim was put in apprehension of such contact. *Burns v. Mayer*, 175 F. Supp.
 5 2d 1259, 1269 (D. Nev. 2001) (citing Restatement (Second) of Torts, § 21 (1965)). Diggs alleges
 6 that Officer Roberts approached him from behind and tackled him by surprise and without
 7 warning. Thus, Diggs could not have had a reasonable apprehension of immediate bodily harm
 8 because he was neither aware of Officer Roberts presence behind him, nor did he see Officer
 9 Roberts, before the surprise tackle. *See Romero v. Las Vegas Metro. Police Dep't*, No.
 10 2:10-cv-00537, 2011 WL 1561077, at *3 (D. Nev. Apr. 25, 2011). As such, Diggs' claim fails as
 11 a matter of law. Accordingly, the Court grants Officer Roberts' motion on the assault claim.

12 To establish a battery claim, a plaintiff must demonstrate that the defendant (1)
 13 intended to cause harmful or offensive contact and (2) such contact did occur. *Burns*, 175 F. Supp.
 14 2d at 1269 (citing Restatement (Second) of Torts, §§ 13, 18)). In Nevada, “[p]olice officers are
 15 privileged to use the amount of force reasonably necessary and are liable for battery to the extent
 16 they use more force than is reasonably necessary.” *Ramirez v. City of Reno*, 925 F. Supp. 681, 691
 17 (D. Nev. 1996) (applying Nevada law); *see Yada v. Simpson*, 913 P.2d 1261, 1262 (Nev. 1996).
 18 Therefore, the standard for battery by a police officer under Nevada law is the same as a § 1983
 19 claim. As discussed previously, genuine issues of material fact remain regarding whether Officer
 20 Roberts used reasonable force to arrest Diggs. Accordingly, the Court denies Officer Roberts'
 21 motion on the battery claim.

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CONCLUSION

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Accordingly, and for good cause appearing,

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IT IS HEREBY ORDERED that Defendant Las Vegas Metropolitan Police
5 Department's Motion for Summary Judgment (#88) is GRANTED.

6

IT IS FURTHER ORDERED that Defendants Terry Roberts and Damian Walburn
7 Motion for Summary Judgment (#89) is GRANTED in part and DENIED in part as follows:

8

- Defendant Damian Walburn's Motion is GRANTED.
- Defendant Terry Roberts' Motion is GRANTED as to Plaintiff's claims for
intentional infliction of emotional distress, negligent infliction of emotional
distress, and assault, and DENIED as to all other claims.

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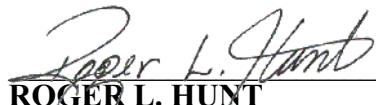
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Dated: June 30, 2015.

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ROGER L. HUNT
United States District Judge

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